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No. 85-104

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

DERRICK KABANUK,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MINNESOTA

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

I. THE PETITIONER DID NOT WAIVE HIS RIGHT TO A TRIAL BEFORE THE JUDGE WHO WOULD DETERMINE HIS GUILT OR INNOCENCE.

The Respondent, State of Minnesota, in its brief opposing a Writ of Certiorari in this case, argues that the Writ should be denied because Petitioner waived his right to a trial before the judge who was to decide his case. That argument is false as a matter of fact, and erroneous as a matter of law.

Petitioner did not waive his right to a trial before the judge who was to decide his case. On the contrary, Petitioner asserted this right in the trial court and continuously thereafter at all stages of the appellate process. The Respondent contends that Petitioner waived his right when he did not initially object to the assignment of a referee. But this contention is untenable

because Petitioner was never informed of the right to object to the assignment of a referee and was not aware of the right.

Fundamental constitutional rights are not waived unless the waiver is knowingly and intelligently made. As this Court held in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), the standard for a valid waiver is that there must be "an intentional relinquishment of a known right or privilege." In the present case, Petitioner was completely unaware of his right to have his trial before the judge, and therefore could not have knowingly and intelligently waived this important right.

The waiver of fundamental rights may not be presumed from a silent record. Carnley v. Cochran, 369 U.S. 506 (1962). In this case, moreover, the record is not silent. Petitioner clearly testified

at the hearing before the trial court on his motion for a trial de novo that he had not been advised by the court or by his court-appointed counsel that he had the right to object to a referee and have his trial before the judge. He further testified that he was not aware of this right. (SA. 3-5). This testimony was never controverted by the State. Nor did the Court of Appeals hold that the Petitioner had knowingly and intelligently waived his right to a trial before the judge. Rather, that Court held that the Minnesota statutory scheme did not require a knowing and intelligent waiver, and that Petitioner "must be deemed" to have waived the right to object to the assignment of a referee. In re D.K., 363 N.W.2d 877, 880 (Minn. App. 1985).

The record in this case contains no indication that the Petitioner was ever advised of his right to object to the

assignment of his case to a referee. On the contrary, the record establishes that he was not informed of that right and was not aware of it. Whatever the effect of Petitioner's failure to object to the assignment of a referee, it cannot be said that Petitioner knowingly and intelligently waived his right to a trial before the judge who was to determine his guilt or innocence.

II. THE JUVENILE COURT JUDGE IS THE SOLE FACTFINDER AND ADJUDICATOR IN JUVENILE DELINQUENCY PROCEEDINGS IN THE STATE OF MINNESOTA.

The Respondent argues that the referee, and not the juvenile court judge, is the true trier of fact in delinquency cases, unless the judge grants de novo review. This novel interpretation of the statute was not adopted by the Court of Appeals and is not supported by Minnesota case-

law.*

An argument identical to Respondent's argument here was advanced by appellants and rejected by this Court in the case of Swisher v. Brady, 438 U.S. 204 (1978). There appellants argued that under the Maryland juvenile court procedure they were subjected to the determinations of two factfinders: first the master and then the juvenile court judge. Speaking for the Court, Mr. Chief Justice Burger stated:

> "Within the limits of the jury trial rights *** and other constitutional constraints, it is for the State, not the parties,

*The cases are cited in the Petition for a Writ of Certiorari at p. 9, n. 3. In addition to the cases cited there, the Minnesota Supreme Court has held that, where review of the findings of a referee is sought, the parties are entitled to the independent judgment of the trial court judge. Peterson v. Peterson, 308 Minn. 297, 242 N.W. 2d 88 (1976).

> to designate and empower the factfinder and adjudicator. And here Maryland has conferred those roles only on the Juvenile Court judge." Id. at 216.

The same observation applies with equal force to the Minnesota statutory scheme, which is similar to that of Maryland in all relevant respects.

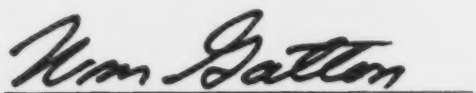
There are not two separate factfinders in juvenile delinquency proceedings in Minnesota, but only one. The sole factfinder and adjudicator is the Juvenile Court judge, and it is he who must be convinced of the guilt of the accused beyond a reasonable doubt.

CONCLUSION

Respondent has not negated the importance and substantiality of the constitutional question presented by Petitioner. Indeed, the failure of the Respondent to face the issue presented in the petition, except by the false claim

of waiver and a blatant distortion of Minnesota law, renders it even more apparent that review by this Court is warranted. Accordingly, Petitioner urges that the Writ of Certiorari be granted.

Respectfully submitted,



WILLIAM J. GATTON
Counsel for Petitioner

SUPPLEMENTARY
APPENDIX

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

JUVENILE COURT DIVISION

In the Matter of the
Welfare of:

D.C. #81600-96
2-23-84

DERRICK KABANUK

The above-entitled matter came duly on for hearing before the Honorable Allen Oleisky, Judge of the above named Court on the 2nd day of February, 1984, 328 Courthouse, City of Minneapolis, County of Hennepin, State of Minnesota.

Appearances were as follows:

MR. GLEN BOYCE, Assistant Hennepin County Attorney appeared for and on behalf of the State of Minnesota.

MR. WILLIAM GATTON, Attorney at Law, appeared for and on behalf of Derrick

Kabanuk.

MS. JANE SCHLEUSNER, appeared as Official Court Reporter.

* * *

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WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
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WHEREUPON, the following proceeding were duly had:

* * *

DERRICK KABANUK

PROCEEDINGS:

THE COURT: Mr. Gatton, I believe you are the moving party.

MR. GATTON: Yes, Your Honor. Before I begin the argument I wonder if I could call to the stand Derrick Kabanuk?

THE COURT: Derrick, can you step forward?

DERRICK KABANUK,

after having been first duly sworn, was examined and testified as follows:

MR. GATTON: Your Honor, for the record at this point we would waive in behalf of my client -- I would waive the presence of his mother in this matter.

THE COURT: Very well.

DIRECT EXAMINATION

BY MR. GATTON:

Q Derrick, will you state your full name for the record?

A Derrick Kabanuk.

Q What is your address?

A 6931 Dallas Road, Brooklyn Center.

Q Derrick, last year on October 26th, did you have a trial in a delinquency case in this court?

A Yeah.

Q Speak out loud.

A Yes, I did.

Q And that hearing was tried before a referee of the Juvenile Court, is that right?

A Yeah, yes.

Q Referee Thomas Haeg, is that right?

A Yeah.

Q And you had an attorney at that time who was appointed as a Public Defender who was representing you, is that right?

A Yes.

Q And his name was James Trench, is that right?

A Yes.

Q Now Derrick, at any time during those proceedings did Mr. Trench inform you that you had a right under the law to have your trial heard by a Judge of the Juvenile Court rather than a Referee?

A No.

Q At any time during those proceedings were you informed by the Court, that is by the Referee, that you had a right to have your trial on that charge before a Judge of the Juvenile Court rather than a Referee?

A No.

Q Derrick were you aware of the fact that you had a right to have your trial before a Judge of the Juvenile Court rather than a Referee?

A No, I wasn't.

MR. GATTON: No further questions.

THE COURT: Mr. Boyce?

MR. BOYCE: No questions, Your Honor.

(Witness excused.)